

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERMAINE SHONTE RAINES,

Defendant-Appellant.

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UNPUBLISHED

August 13, 2009

No. 276146

Berrien Circuit Court

LC No. 2006-400100-FC

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of armed robbery, MCL 750.529; two counts of assault with intent to do great bodily harm less than murder, MCL 750.84; carrying a concealed weapon, MCL 750.227; possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony, MCL 750.227b.<sup>1</sup> The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 40 to 60 years' imprisonment for each of his armed robbery convictions, 5 to 15 years' imprisonment for each of the assault with intent to do great bodily harm convictions, 5 to 15 years' imprisonment for the carrying a concealed weapon conviction, 5 to 15 years' imprisonment for the possession of a firearm by felon conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

On appeal, defendant first contends that the prosecution improperly failed to produce Kenneth Williams for trial. Defendant claims that Williams was a known *res gestae* witness. Defendant did not move for a new trial regarding this allegation of error, and it is not preserved. *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989). We review unpreserved issues for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Under MCL 767.40a(1), (2), and (3), the prosecution has a duty to attach to the information a list of all witnesses the prosecution might call at trial and all known *res gestae* witnesses, to update the list as additional witnesses become known, and to provide the defendant a list of witnesses the prosecution intends to call at trial. *People v Koonce*, 466 Mich 515, 520-

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<sup>1</sup> The jury also found defendant guilty of assault with a dangerous weapon, MCL 750.82. However, at sentencing that charge was merged into one of the armed robbery convictions.

521; 648 NW2d 153 (2002). Additionally, under MCL 767.40a(5), the prosecution must render “reasonable assistance” in locating and serving process on witnesses upon request of the defendant. *Koonce, supra* at 522. While no precise definition of “res gestae witness” exists, *People v Rivera*, 114 Mich App 419, 422 n 3; 319 NW2d 355 (1982), this Court recently indicated that a res gestae witness is one who witnessed some event in the continuum of the criminal transaction and whose testimony would have assisted in developing a full disclosure of the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001).

In this case, Otis Jones testified that defendant made certain admissions in front of Jones and “Kenny Williams” on the day after the instant criminal transaction. It is undisputed that Williams did not witness some event in the continuum of the criminal transaction and his testimony would not have assisted in developing a full disclosure of the facts surrounding the commission of the crime; thus, he was not a res gestae witness. *People v Reynolds*, 93 Mich App 516, 521; 286 NW2d 898 (1979). Defendant cites a police report that was not included in the lower court record to support his argument that Williams was a res gestae witness. While this constitutes an improper expansion of the record on appeal, MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004), we find that the police report supports that Williams was not a res gestae witness. Williams disavowed any knowledge of the incident at issue, other than hearing that a white female had been shot. The prosecution did not list Williams as a witness, res gestae or otherwise. Because Williams was not a listed witness, the prosecution was not required to call him at trial. See *Koonce, supra* at 517-520. Further, nothing in the record suggests that defendant wanted Williams produced at trial. Only upon request by defendant must the prosecution produce a res gestae witness (or demonstrate due diligence in failing to produce such a witness). See MCL 767.40a(5). Defendant never requested the prosecution’s assistance, and there was no directive from the trial court; thus, there was no obligation for the prosecution to assist defendant in finding Williams. Defendant failed to establish plain error affecting his substantial rights. *Carines, supra* at 763-764.

Defendant next raises several claims of ineffective assistance of counsel. Our review is limited to errors apparent on the record, because no evidentiary hearing was held and no findings were made regarding these allegations. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To prevail on a claim of ineffective assistance of counsel, defendant must prove that trial counsel’s “performance was deficient” and that deficiency “prejudiced the defense.” *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

First, defendant claims that trial counsel rendered ineffective assistance of counsel for failing to produce or to seek assistance to produce Williams for trial. Whether counsel calls a given witness to testify is presumed to be trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The sole utility of Williams’ testimony would have been to try to refute Jones’ testimony regarding defendant’s admissions. The failure to call a supporting witness does not inherently constitute ineffective assistance of counsel. *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). On this record, we conclude that trial counsel’s performance did not fall below an objective standard of reasonableness under prevailing professional norms when he failed to produce Williams at trial or seek the prosecutor’s assistance in doing so. *Matuszak, supra* at 57-58. Defendant has not demonstrated that but for counsel’s failure to produce or request assistance in producing Williams, the outcome of trial would have been different. *Id.*

Second, defendant asserts that trial counsel should have requested a missing witness jury instruction. A defendant is entitled to a missing witness jury instruction when the prosecution fails to produce a listed witness at trial or fails to seek leave from the trial court to excuse the witness for good cause. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003); *People v Cook*, 266 Mich App 290, 293 n 4; 702 NW2d 613 (2005). Because the prosecution was not required to produce Williams at trial, defendant was not entitled to a missing witness jury instruction. *Perez*, *supra* at 420; *Cook*, *supra* at 293 n 4. Trial counsel does not render ineffective assistance for failing to advocate a position lacking in merit. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Third, defendant contends that trial counsel rendered ineffective assistance of counsel for failing to introduce a prior inconsistent statement by Jones at trial. Defendant essentially claims that trial counsel did not adequately conduct cross-examination of Jones regarding his prior inconsistent statement, made at the preliminary examination. Ultimately, defendant has failed to demonstrate how trial counsel's failure to introduce the statement at issue resulted in prejudice to defendant. Defendant has not demonstrated that but for trial counsel's "error," the result of the proceeding would have been different. *Matuszak*, *supra* at 58.

Next, defendant raises several issues in his standard 4 supplemental brief, all of which lack merit. First, defendant argues that the prosecution engaged in several instances of prosecutorial misconduct, specifically it (1) improperly questioned defendant regarding the credibility of another witness; (2) improperly bolstered its witnesses during closing arguments; and (3) improperly commented on defendant's truthfulness during closing arguments.<sup>2</sup> Defendant's unpreserved allegations of prosecutorial misconduct are reviewed for plain error affecting his substantial rights. *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), vacated in part 477 Mich 856 (2006).

Generally, the prosecution has "great latitude to argue the evidence and all [reasonable] inferences relating to the [prosecution's] theory of the case." *Id.* This Court evaluates the prosecution's challenged comments in light of defense counsel's arguments and the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). The prosecution must not denigrate the defendant, *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995), but it need not limit arguments to the "blandest of all possible terms," *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

We conclude that reversal is not warranted based on defendant's allegations of prosecutorial misconduct. Although we agree that the prosecution's question to defendant regarding whether one of the witnesses was lying was improper, we find that there was no prejudice resulting from this improper question. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Next, the prosecution did not engage in improper bolstering of its witnesses. Reviewed in context, the prosecution was arguing that the credibility of its witnesses should be

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<sup>2</sup> Defendant implies numerous other claims of misconduct, which we find abandoned because we will not search the record for a factual basis to support or reject these positions; *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

judged based on the evidence and reasonable inferences. This is proper. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The closing argument and rebuttal were based on the prosecution's theory of the case as supported by the evidence and reasonable inferences derived therefrom. See *Walker*, *supra* at 542. Finally, the prosecution used strong terms to characterize defendant's testimony, and at one point, appeared to express a personal opinion regarding defendant's credibility. However, the prosecution was not limited to using the least prejudicial argument available, and did not need to state inferences in the blandest possible terms. *Aldrich*, *supra* at 112. Further, the prosecution never implied special knowledge of defendant's truthfulness. *Bahoda*, *supra* at 276-277, 286-287. We conclude that any prejudice possibly resulting from the challenged arguments was not so great that it could not have been cured by a timely instruction, if one was warranted. *People v Moorer*, 262 Mich App 64, 78-79; 683 NW2d 736 (2004). Defendant failed to establish plain error affecting his substantial rights, and reversal is not warranted. *Carines*, *supra* at 774.

Additionally, defendant argues that defense counsel rendered ineffective assistance of counsel for failing to object to the aforementioned allegations of prosecutorial misconduct. This claim was not included in defendant's statement of the question presented. See MCR 7.212(C)(5). Nevertheless, we reviewed the record and find these allegations of ineffective assistance of counsel to be without merit. Defendant has not demonstrated that but for counsel's conduct, the result of his trial would have been different. *Matuszak*, *supra* at 59.

Next, defendant asserts that his due process rights were violated when the prosecution improperly presented voice identification evidence without an expert opinion. Generally, this Court reviews a trial court's ruling to admit evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006); however, where an allegation of error is unpreserved, as here, our review is limited to plain error affecting substantial rights. *Carines*, *supra* at 763-764. MRE 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Regarding voice identification, MRE 901(b)(5) provides: "Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." In the context of an audiorecording, MRE 901 requires only that "a tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape." *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991). "If a tape, or any other proposed exhibit that is subject to the MRE 901 requirement of authentication, is shown to be 'what its proponent claims,' then it has been authenticated sufficiently." *Id.* at 52.

Defendant's parole agent Marvin Bruins met defendant approximately 20 times from September to December 2005. At trial, Agent Bruins testified that he was familiar with defendant's voice, and he identified defendant's voice on the 911 recording as the person who was "demanding the property." During cross-examination, Agent Bruins admitted that he was not present at the scene so he did not witness the instant incident. He also admitted that he has no "specialized training in voice identification." Nevertheless, any claim that Agent Bruins did not have specialized training relates to the weight of the evidence, not its admissibility. Additionally, one of the victims testified that she had listened previously to the recording and that it was an accurate recording of the events that occurred on the night in question. She

testified that only she, the other victim, and defendant were in the car, and she identified defendant's voice on the recording. We conclude that the prosecution, through the testimony of a victim and Agent Bruins, satisfied the authentication requirement of MRE 901, *id.* at 52, and there was no improper expert testimony. Moreover, defendant's statements on the 911 recording were admissible as party admissions. MRE 801(d)(2). Ultimately, we find that defendant failed to establish that there was a plain error requiring reversal. *Walker, supra* at 542.

In reaching a conclusion, we also note that defendant argues that defense counsel rendered ineffective assistance of counsel for failing to object to Agent Bruins' testimony or by failing to obtain an expert witness on "the unreliability of the voice recording." "[T]rial counsel is not ineffective when failing to make objections that are lacking in merit." *Matuszak, supra* at 58.

Next, defendant contends that the victims viewed an unduly suggestive photographic array. "Where issues concerning identification procedures were not raised at trial, they will not be reviewed by this Court unless refusal to do so would result in manifest injustice." *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). "[D]ue process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures." *People v Hickman*, 470 Mich 602, 607; 684 NW2d 267 (2004), quoting *Moore v Illinois*, 434 US 220, 227; 98 S Ct 458; 54 L Ed 2d 424 (1977). Our Supreme Court has held that "[t]he relevant inquiry, therefore, is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification." *People v Kurylczuk*, 443 Mich 289, 306; 505 NW2d 528 (1993). Generally, a photographic lineup is not suggestive so long as it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification. *Id.* at 304.

At trial, Detective Christopher Takemoto testified that the police created a photographic lineup for the victims, which depicted six African-American males. Generally, the individuals' heads are depicted, although one subject's head and shoulders are depicted. All the individuals appear to have either very short hair or are completely bald, and all appear to have at least some facial hair. Picture number three depicted defendant. Detective Takemoto interviewed the victims separately. At both interviews, Detective Takemoto asked the victims if they could identify the perpetrator from the photographic array. Both victims indicated that picture number three depicted the perpetrator.

In his standard 4 brief, defendant challenges the photographic array on the basis of physical differences between himself and the other lineup participants. However, "[p]hysical differences between defendant and the other lineup participants goes to the weight of the identification and not its admissibility." *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). "Differences among participants in a lineup are significant only to the extent they are apparent to the witness and substantially distinguish defendant from the other participants in the line-up." *Kurylczuk, supra* at 312 (citation omitted). Our review refutes that differences among the participants substantially distinguished defendant. The lineup was not unduly suggestive.

Next, defendant argues that the trial court abused its discretion in denying his motion for new appellate counsel. Because defendant received new appellate counsel, this issue is moot. See *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004).

Finally, defendant asserts that the trial court improperly denied his motion to substitute trial counsel. Our review of the record reveals that this was a case where trial counsel did not see things defendant's way, so defendant sought different counsel. Defendant did not show any particular legitimate difference of opinion over a fundamental trial tactic, and we conclude that the denial of defendants' motion for substitute counsel was proper because there was no showing of good cause. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). Moreover, defendant also argues in this context that trial counsel rendered ineffective assistance of counsel at every stage of the proceedings; thus, defendant demonstrated good cause for substitution of counsel. However, the record does not support defendant's claims. Defendant failed to meet his burden of establishing the factual predicate for claims of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Affirmed.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Elizabeth L. Gleicher